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No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

DIE AND TOOLMAKERS LODGE 113
INTERNATIONAL ASSOCIATION OF MACHINISTS
(AFL-CIO), *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Board (quite properly, from its point of view) argues certiorari should be denied in this cause because only its determinations of questions of fact are involved, which this Court does not, and should not, review.

The Board thereby persists in its determined effort to avoid joining issue with the Petitioner to resolve several important questions of law and construction of the statute involved in this case, primarily, whether

a union security agreement admittedly valid under the first proviso of Section 8(a)(3) of the Act constitutes a good and sufficient defense to a charge of violation of Section 8(b)(2) of the Act, where it is conceded the employee whose discharge precipitated the charge lost his union membership during the term of the agreement by virtue of his entire failure to make an affirmative and timely tender of dues.

The Board (again quite properly from its point of view) omits citation of its findings, and the evidence, concerning the dischargees' loss of *union membership,* concentrating instead on several secondary motivations (besides the non-membership motivation) the Union allegedly had for desiring their discharges.

To correct these omissions and to more fully inform the Court concerning the facts germane to the major question of law and statutory construction raised by the Petition and set out above, the following is submitted:

1. Edward Salisbury

Repondent limits its statement in regards Salisbury to an alleged offer to make a tender of dues by Salisbury in *September and November of 1953* (Opp. Brief, p. 7). This, however, is not the period with which we are here concerned, inasmuch as Edward Salisbury's union membership automatically terminated on *June 30, 1953.* To employ the Board's words:

> "The last month for which Salisbury paid his dues was March, 1953. He made no tender of dues to the Union during the months of April, May and June, 1953, and his membership automatically terminated at the end of June under the Union's 3-month rule." (Petition, p. 2a).

The Board's discussion of the alleged "futility" of a dues tender by Salisbury prior to June 30, 1953 is patently irrelevant, inasmuch as there is neither evidence of record that, prior to June 30, 1953, Salisbury had any notice from the Union, either directly or indirectly, to the effect that his tender of dues unaccompanied by a strike fund donation would be refused, nor any evidence of record that, prior to June 30, 1953, Salisbury had knowledge of any Union act or statement which could reasonably have caused him to believe that, were he to make a tender of dues unaccompanied by a strike fund donation to the Union prior to June 30, 1953, the Union would have refused it.

Under these circumstances a conclusion that a timely (Prior to June 30, 1953) dues tender by Salisbury would have been refused by the Union is pure speculation.

2. James Bellendir

While Bellendir's case is complicated by a misunderstanding over the application of a money order mailed to the Union's business office on October 28, 1953, his loss of Union membership because of his failure to tender dues is clear and undisputed.

Bellendir personally appeared at the Union's business offices in the latter part of May, 1953, and paid his dues for the months of May and June, 1953 (R. 162). At a time undisclosed by the record, but clearly falling between May and October, 1953, Bellendir mailed his July, 1953 dues to the Union's business offices, where the payment was duly recorded and receipt acknowledged (R. 162).

On or about October 28, 1953, Bellendir again (belatedly) mailed his August 1953 dues to the Union's business offices (R. 162). Due to the extremely heavy volume of mail receipts at the Union's business offices, of both dues payments and strike fund contributions, a shortage of clerical personnel, and no designation by the sender of the purpose for which the money order was intended, it was credited as a donation to the Union's strike fund and receipt therefor issued (R. 44; 168; 262; 265-266; 365). When Bellendir received his clearly-marked receipt to this effect, he contacted his Union Steward at the plant, who told him to call or contact the Union's business office and the mistake would be rectified (R. 166-167). Bellendir neither contacted the business office nor corrected the Steward's assumption that he would carry out the suggestion (R. 166-167). Neither did he pay any further dues (R. 164). The first knowledge the Union's business office had of the mistake came during the course of the processing of the charge before the Board, upon which notice the mistake was promptly rectified, just as all similar mistakes had been on notice thereof in the past (R. 70-74; 266; 268-272).

The record clearly and undisputedly demonstrates that Bellendir's membership was automatically terminated on the Union's records on October 31, 1953, by his failure to make a valid tender of his August, 1953 dues to the Union prior to that date. And even with credit for the mistaken October 28, 1953 payment, Bellendir's failure to make any further tender of his September, 1953 dues at any time prior to November 30, 1953 caused the automatic termination of his membership.

Again the Board's discussion of the alleged "futility" of a dues tender by Bellendir to the Union is irrelevant; the Union not only accepted every valid dues tender ever made by Bellendir prior to the October 28, 1953 tender of his August, 1953 dues, its steward gave him assurances the mistaken credit of that tender would be corrected on notice to the appropriate Union office, and the Board itself *dismissed* that section (Paragraph 8[b]) of its complaint charging that the Union *deliberately* misapplied the October 28, 1953 tender (R. 16; 24-25 [Paragraph 2]; 380 [Footnote 4, 3rd sentence]; 365).

3. Joseph Pieha

Pieha personally appeared at the Union's business offices on June 22, 1953 and paid his May, 1953 dues. He made no further tender of dues, and his membership terminated automatically on August 31, 1953. As the Board stated:

> "On June 22, 1953 Pieha succeeded in paying his dues for the month of May at the Union office . . . He made no tender of dues for the months of June, July and August, and therefore, according to the Union rules, his membership was terminated at the end of the month of August." (Petition, p. 2a-3a).

Once more the Board's discussion of the alleged 'futility' of a dues tender by Pieha to the Union prior to August 31, 1953 is irrelevant and speculative, inasmuch as the "futility" doctrine may only be invoked by one *whose affirmative tender has been refused.* Even crediting Pieha's self-serving testimony to the effect he was advised by the Union on June 22, 1953 that it would expect any further dues tenders from him to be

accompanied by a donation to the Union Strike Fund, Pieha's failure to make an affirmative tender of dues to find out whether such tender of dues without an accompanying donation would be refused or accepted bars application of the doctrine.

CONCLUSION

In view of the above and the material set out in our Petition for Writ of Certiorari to the United States Court of Appeals for the 7th Circuit, Petitioner respectfully requests that a Writ of Certiorari issue in the subject case.

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